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Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~[illegible]~~ 24

JOSEPH WALLER, JR.,

Petitioner,

—versus—

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

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Petitioner, Joseph Waller, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of Florida, Second District, entered on August 28, 1968, rehearing denied September 17, 1968, affirming the judgment and sentence entered on July 6, 1967 by the Circuit Court for the Sixth Judicial Circuit of Florida in and for Pinellas County, which sentenced him to imprisonment for a term of from six months to five years for the crime of grand larceny.

A petition for writ of certiorari was denied by the Supreme Court of Florida on December 4, 1968, for want of jurisdiction.

Opinions Below

The opinion of the District Court of Appeal of Florida, Second District, is reported at 213 So. 2d 623, and is set out in the Appendix, *infra*, p. 15, together with a copy of the order denying rehearing entered on September 17, 1968. Appendix, *infra*, p. 19. The order of the Supreme Court of Florida denying the petition for writ of certiorari is set out in the Appendix, *infra*, p. 21.

Jurisdiction

The judgment of the District Court of Appeal of Florida, Second District, was rendered and entered on August 28, 1968. Rehearing was denied on September 17, 1968. The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1257(3).

Questions Presented

1. Whether successive municipal and state prosecutions of the same defendant arising out of the same conduct violate the rule against double jeopardy and thereby violate the due process clause of the Fourteenth Amendment.

2. Whether a sentence of imprisonment and its affirmance on appeal violate the due process clause of the Fourteenth Amendment where the trial judge imposed sentence after reading a pre-sentence investigation report which he refused to make available either to the defendant or to the appellate court.

Statement of the Case

A mural on a prominent wall inside the City Hall of St. Petersburg, Florida, depicted a group of Negroes (R. 116, 117).* Petitioner and a number of other persons who found the mural an offensive caricature of their race assembled outside the City Hall during business hours on December 29, 1966. Some members of the group entered the City Hall, removed the mural from the wall and carried it through the streets of the city until they were confronted by police officers. After a scuffle the police recovered the mural which by then was in a damaged condition.

Petitioner was charged by the City of St. Petersburg with the violation of two ordinances: destruction of city property and disorderly breach of the peace. The municipal court found him guilty on both charges and he was sentenced to be jailed for ninety days on each charge (R. 37, 39, 81).

While petitioner was serving the sentence imposed by the municipal court, an information was filed charging him with the felony of grand larceny, on the basis of the same conduct as was involved in the municipal court trial (R. 81). Before the grand larceny prosecution came on for trial, petitioner filed a motion to quash the information on the grounds that prosecution was barred by the double jeopardy provisions of the Florida and United States Constitutions. The motion was denied (R. 80-85). Petitioner then moved the Supreme Court of Florida, suggesting that a writ of prohibition issue to prevent the trial in view of the double

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* The symbol "R—" refers to the record on appeal to the District Court of Appeals of Florida, Second District.

jeopardy rule. The Supreme Court of Florida denied prohibition, without opinion. *State ex rel. Waller* v. *Circuit Court for the Sixth Judicial Circuit in and for Pinellas County*, 201 So. 2d 554 (Fla. 1967).

Thereafter trial was held in the Circuit Court. The jury found petitioner guilty of grand larceny (R. 127). The judge directed a pre-sentence investigation to be conducted. On July 6, 1967, having received the pre-sentence investigation report, the court pronounced sentence of imprisonment for a term of from six months to five years (the statutory maximum), less the 170 days already spent in jail (R. 138). Petitioner unsuccessfully moved for discovery of the pre-sentence investigation report, both before and after sentencing (R. 139).

In preparing his appeal to the District Court of Appeal of Florida, Second District, petitioner moved the trial court to include the pre-sentence investigation report in the record on appeal. The motion was denied. Petitioner filed in the District Court of Appeal a certified copy of the trial court's order denying the motion. In his appellate brief and argument before the District Court of Appeal, petitioner insisted he had a federal constitutional right to discovery of the pre-sentence investigation report.

The District Court of Appeal affirmed, with opinion, on August 28, 1968. *Waller* v. *State of Florida*, 213 So. 2d 623 (2d DCA, Fla., 1968), Appendix, *infra*, p. 15.

On the double jeopardy issue the District Court of Appeal stated:

> "Assuming but not holding that the violations of the municipal ordinances were included offenses of the crime of grand larceny, the appellant nevertheless has

not twice been put in jeopardy, because even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court. This has been the law of this state since 1894 . . ." App., pp. 16-17.

The District Court of Appeal did not expressly rule upon the question of non-discovery of the pre-sentence investigation report. However the court evidently rejected petitioner's argument on the matter by stating, in its opinion:

"The appellant's other assignments of error and points on appeal have been carefully considered and found to be without merit." App., p. 18.

In affirming the denial of the motion for discovery of the pre-sentence report, the court was clearly following Florida law. *Morgan* v. *State of Florida*, 142 So. 2d 308 (2d DCA, Fla., 1962).

In his petition for rehearing, petitioner requested the District Court of Appeal to enlarge its opinion so as to identify and expressly rule upon the federal constitutional question of the pre-sentence investigation report. Rehearing was denied without opinion on September 17, 1968. *Waller* v. *State of Florida*, 213 So. 2d 623 (2d DCA, Fla., 1968).

On September 27, 1968 petitioner filed a timely petition for writ of certiorari in the Supreme Court of Florida, followed by a supplemental statement on jurisdiction filed on October 16, 1968. The Supreme Court of Florida denied the petition on December 4, 1968, for want of jurisdiction.

Reasons for Granting the Writ

I.

Successive municipal and state prosecutions of the same defendant arising out of the same conduct are clear violations of the rule against double jeopardy, and have been justified only by outmoded theories which this Court has discarded; the rule against double jeopardy should be made fully applicable to the states by the due process clause of the Fourteenth Amendment.

Over sixty years ago this Court held that the double jeopardy rule bars successive prosecutions by a territory and by the United States, since both are arms of the same sovereign. *Grafton* v. *United States*, 206 U. S. 333, reiterated in *People of Puerto Rico* v. *Shell Co.*, 302 U. S. 253.

By analogy, successive prosecutions by municipal and state governments should be barred, since the municipality is a mere creature of the state exercising a delegated portion of the state's sovereignty. Antieau, Municipal Corporation Law, Sec. 4.A4 (1964).

The due process clause of the Fourteenth Amendment imposes some limits on the power of the states to prosecute a person twice for the same offense. *Palko* v. *Connecticut*, 302 U. S. 319 held that these limits were not coextensive with the limits imposed upon the federal courts by the Fifth Amendment. In later cases this Court held that the question in any given situation must be whether multiple state trials would lead to "fundamental unfairness." *Hoag* v. *New Jersey*, 356 U. S. 464; *Ciucci* v. *Illinois*, 356 U. S. 571. This Court indicated substantial interest in recon-

sidering the matter in *Cichos* v. *Indiana*, 385 U. S. 76, but eventually dismissed the writ of certiorari as having been improvidently granted.

At least two other courts have anticipated, in view of this Court's general expansion of the scope of the due process clause of the Fourteenth Amendment, that the double jeopardy clause of the Fifth Amendment is fully binding on the states by virtue of the Fourteenth Amendment. *State* v. *Farmer*, 48 N. J. 145, 224 A. 2d 481 (1966); *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844 (CA 2, 1965), *cert. den.* 383 U. S. 913.

Without a clear pronouncement by this Court, Florida and some other states have permitted successive prosecutions by municipal and state governments, justifying the practice by a variety of reasons which cannot be sustained.

The English common law, sometimes offered as a justification, in fact prohibits successive prosecutions by municipal and state governments. The matter was settled over three centuries ago in *R.* v. *Thomas*, 1 Sid. 179, 82 Eng. Rep. 1043; 1 Lev. 118, 83 Eng. Rep. 326; 1 Keb. 663, 83 Eng. Rep. 1172 (K. B. 1662). In Canada, where the traditions of the English common law exist in a federal system, there is not a single recorded instance in which a defendant has been subjected to successive prosecutions by dominion, provincial and municipal governments, or by any two of the three. See Grant, Penal Ordinances and the Guarantee Against Double Jeopardy, 25 Geo. L. J. 293, 312 (1937); Grant, Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons, 4 U. C. L. A. L. Rev. 1, 8-13 (1956).

Another justification often used in support of successive prosecutions by municipality and state is the alleged "sovereignty" of municipalities.

If municipalities were sovereign, successive municipal and state prosecutions could be viewed as successive prosecutions by two separate sovereigns, which this Court permitted in *Bartkus* v. *Illinois*, 359 U. S. 121, and in *Abbate* v. *United States*, 359 U. S. 187. Subsequent pronouncements by this Court have cast serious doubt upon the continued validity of the *Bartkus-Abbate* rule; see *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 78. And the severe critical comment provoked by *Bartkus* and *Abbate* suggests that this Court may wish to reconsider the rule they represent.

However the present case can be disposed of without disturbing the *Bartkus-Abbate* rule, since the analogy between successive federal and state prosecutions or vice versa (*Bartkus-Abbate*) is inapplicable to successive municipal-state prosecutions.

Municipalities are in fact not sovereign, and never were, as this Court pointed out in *Reynolds* v. *Sims*, 377 U. S. 533, 575. The correct analogy to successive municipal-state prosecutions is found in *Grafton*, *supra*, which prohibits successive territorial-federal prosecutions.

It is sometimes asserted that municipal proceedings are not "criminal" and consequently do not constitute prior jeopardy. However this Court has held that where the object of "quasi-criminal" proceedings is to penalize for the commission of an offense against the law, the safeguards applicable to criminal proceedings must be made available. *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693; *In re Gault*, 387 U. S. 1.

Effective law enforcement will be perfectly possible if successive municipal and state prosecutions are eliminated; city and state prosecutors can cooperate so as to have each case tried in the appropriate court. See, e.g., *State* v. *Mark*, 23 N. J. 162, 128 A. 2d 487 (1957). Indeed the quality of law enforcement may be improved, since imposition of the double jeopardy rule may well discourage such practices as "the palpable ruse of a breach-of-the-peace charge concocted to give the police time to pursue their investigation" of a more serious crime. *Culombe* v. *Connecticut*, 367 U. S. 568, 631-32.

Consequently this Court should grant certiorari in order to announce that the due process clause of the Fourteenth Amendment prevents successive municipal and state prosecutions of the same defendant for the same conduct.

II.

A trial court which sentences on the basis of a secret pre-sentence investigation report violates the defendant's right to a fair trial, confrontation of witnesses and assistance of counsel as required by the due process clause of the Fourteenth Amendment; a similar violation occurs anew when an appellate court affirms the sentence without inclusion of the pre-sentence investigation report in the record on appeal.

This Court has held that a sentencing judge may refer to information contained in a pre-sentence investigation report. *Williams* v. *New York,* 337 U. S. 241; *Williams* v. *Oklahoma,* 358 U. S. 576.

Some of this Court's opinions strongly suggest that a defendant has a constitutionally protected right to examine and rebut the report. *Specht* v. *Patterson,* 386 U. S. 605; *Kent* v. *United States,* 383 U. S. 541; *Townsend* v. *Burke,* 334 U. S. 736. However this Court has not ruled directly on the point.

There is conflict among the circuits. The Fifth and Sixth Circuits hold that the defendant has a right to discovery and rebuttal of the pre-sentence investigation report, except perhaps in very special circumstances. *Stephan* v. *United States,* 133 F. 2d 87 (CA 6, 1943), *cert. den.* 318 U. S. 78; *Smith* v. *United States,* 223 F. 2d 750 (CA 5, 1955). Other circuits leave the matter within the discretion of the trial judge, so long as the statutes and rules leave it there. *Powers* v. *United States,* 325 F. 2d 666 (CA 1, 1963); *United States* v. *Weiner,* 376 F. 2d 42 (CA 3,

1967); *Friedman* v. *United States*, 200 F. 2d 690 (CA 8, 1952).

There is increasing recognition of the need to protect the defendant as much during the sentencing process as during the earlier parts of his trial. *Mempa* v. *Rhay*, 389 U. S. 128. Committees of the American Bar Association, the American Law Institute and the President's Commission on Law Enforcement and Administration of Justice have joined numerous legal scholars in recommending that the defendant or his counsel be permitted to examine and rebut the pre-sentence investigation report.*

The English practice has long permitted disclosure of the pre-sentence investigation report. Thomas, Appellate Review of Sentences and the Development of Sentencing Policy: the English Experience, 20 Ala. L. Rev. 193 (1968).

Without access to the pre-sentence investigation report, a defendant has no opportunity to correct errors which may

* American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures, Tentative Draft, Sec. 4.4 (1967); American Law Institute, Model Penal Code, Proposed Official Draft, Sec. 7.07 (5)(6) (1962); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 144-45 (1967); Bar Association of the District of Columbia, Junior Bar Section, Discovery in Criminal Cases, 33 F.R.D. 47, 127 (1963); Guzman, Defendant's Access to Presentence Reports in Federal Criminal Courts, 52 Iowa L. Rev. 161 (1966); Higgins, Confidentiality of Presentence Reports, 28 Albany L. Rev. 12, 38 (1964); Lorensen, The Disclosure to Defense of Presentence Reports in West Virginia, 69 W. Va. L. Rev. 159, 166 (1967); Wyzanski, A Trial Judge's Freedom and Responsibility, 65 Harv. L. Rev. 1281 (1952); Note, Due Process and Legislative Standards in Sentencing, 101 U. Pa. L. Rev. 257 (1952); Note, Employment of Social Investigation Reports in Criminal and Juvenile Proceedings, 58 Colum. L. Rev. 702 (1958); Note, Procedural Due Process at Judicial Sentencing for Felony, 81 Harv. L. Rev. 821 (1968); Note, Right of Offenders to Challenge Reports Used in Determining Sentences, 49 Colum. L. Rev. 567 (1949).

have been made by the probation officer preparing the report, nor can the defendant offer information which may have been omitted. Without inclusion of the pre-sentence investigation report in the record on appeal, the appellate court has no opportunity to review the sentencing discretion of the trial judge.*

One of the fundamental rights of all parties before courts or tribunals is to know what evidence is being used. *Ohio Bell Telephone Co.* v. *Public Utilities Comm.*, 301 U. S. 292. It is time for this fundamental right to be guaranteed to defendants, not only in connection with the determination of guilt or innocence, but also in connection with sentencing.

Consequently this Court should grant certiorari in order to guarantee that defendants have fair opportunity to examine and rebut pre-sentence investigation reports.

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* In this case, the real possibility of the abuse of discretion is suggested by the fact that the trial judge was reversed twice by Florida appeal courts because of his arbitrary refusal to release petitioner on bond pending appeal. The first time, he was reversed by the District Court of Appeal, Second District, reported as *Waller* v. *State*, 208 So. 2d 147 (2d DCA, Fla., 1968). The second time, he was reversed by the Florida Supreme Court (unreported order). As reported in the St. Petersburg (Florida) Times, November 20, 1968, p. 6B: "Phillips denied Waller access to bail Oct. 5, labeling the action 'a benefit to society.' The State Supreme Court on Nov. 12 reversed Phillips and ordered him to reinstate Waller's $2,500 bond. The high court has not yet acted on Waller's petition for review of his conviction . . ."

CONCLUSION

In view of the considerations set forth above, we respectfully submit that the petition for a writ of certiorari be granted.

Respectfully submitted,

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